

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission,
On Its Own Motion

v.

Pleasant Mound Township Road District, BNSF Railway
Company, and the Illinois Department of Transportation.

Citation with respect to improving public safety at the Country
Club Avenue highway-rail grade crossing of BNSF Railway
Company's track near Smithboro, Bond County, Illinois
designated as crossing AAR/DOT #069 151J, railroad milepost
92.22-Y, by the installation of automatic flashing lights and gates
controlled by constant warning time circuitry, and by providing
any further relief the Commission may deem necessary including
the dividing of cost among the Parties and Commission.

T07-0056

PROPOSED ORDER

By the Commission:

PROCEDURAL HISTORY

On July 25, 2007, the Illinois Commerce Commission (the "Commission") entered a Citation requiring Pleasant Mound Township Road District ("Pleasant Mound Township" or "Township"), BNSF Railway Company ("BNSF" or "Railroad"), and the Illinois Department of Transportation ("IDOT" or "Department") to appear at a hearing in Springfield, Illinois, to show cause, if any there be, why an order should not be entered requiring the installation of automatic flashing light signals and gates controlled by constant warning time circuitry at the County Club Road highway-rail grade crossing of the BNSF Railway Company's track near Smithboro, Bond County, designated as crossing AAR/DOT 069 151J, railroad milepost 92.22-Y, and providing for such further relief as may be necessary.

According to the Citation, Pleasant Mound Township submitted an Application to the Commission's Rail Safety Section on May 17, 2000, requesting that the crossbuck passive warning devices at the Country Club Avenue highway-rail grade crossing of BNSF track be upgraded to automatic flashing Light signals and gates in the interests of public safety. Thereafter, in 2006, the Commission's Rail Safety Section placed the crossing in the Commission's 2007-2011 five-year rail crossing improvement plan, and prepared a Stipulated Agreement authorizing the signalization upgrade. Staff circulated the Stipulated Agreement among the Parties for execution. Commission Staff, BNSF and IDOT all executed the Stipulated Agreement. However, Pleasant Mound Township refused to execute the agreement, and rebuffed all of Commission Rail Safety Staff's attempts to contact the Township and obtain compliance with the request for safety upgrade. Staff sought the Citation from the Commission in order to gain compliance from the Pleasant Mound Township.

Pursuant to notice given in accordance with Law and the rules and regulations of this Commission, a hearing on the Citation was held before the duly authorized Chief Administrative Law Judge ("CALJ") of the Commission at Commission offices in Springfield and Chicago, Illinois, on August 23, 2007. Commission Staff appeared by Transportation Counsel, Steven Matrisch, and presented the testimony of Henry Humphries, Commission Rail Safety Specialist. BNSF and IDOT appeared by counsel. Pleasant Mound Township failed to appear. Pursuant to practice, the CALJ asked Staff Transportation Counsel and counsel for the Railroad and the Department whether the hearing should be continued to provide the Township another opportunity to appear. Staff, the Railroad and IDOT all took the position that the hearing should go forth, given that: (1) Pleasant Mound Township had already refused to participate and ignored numerous attempts by Staff and the Parties to resolve the matter; and (2) the interests of public safety required that the case go forward and the crossing improvements be made at Country Club Avenue and the Railroad's track near Smithboro in Bond County, Illinois.

Pursuant to the requests and argument of Staff and the Parties, the CALJ concurred that the August 23, 2007 hearing should go forth as set forth in the Notice of Hearing, which had been filed and served upon Staff and all Parties, including Pleasant Mound Township, provided that the matter go to Proposed Order, to allow the Township yet another opportunity to appear and participate by filing a Brief on Exception to any Proposed Order filed and issued by the CALJ. After the taking of evidence, at the conclusion of the August 23, 2007 hearing, the record was marked "Heard and Taken."

COMMISSION STAFF'S EVIDENCE

Henry Humphries, Commission Rail Safety Specialist, has an Associate Degree in Engineering and a Bachelor of Arts Degree in Business Management. He had thirteen years experience with the Illinois Department of Transportation as a Field Inspector and Liaison between IDOT and the Commission Railroad Section. At the time of the hearing, Humphries had spent the past 26 years employed in the Commission's Rail Safety Section. Humphries' Commission duties included investigating reports of unsafe rail highway grade crossings and making recommendations of crossing safety improvements.

Humphries testified that, in May of 2000, Pleasant Mound Township filed with the Commission a Crossing Improvement Program Application seeking a new and upgraded crossing warning system at the BNSF-Country Club Avenue highway-rail grade crossing located near Smithboro, Bond County, Illinois. According to the Application, the crossing was currently protected by only passive warning signs and crossbucks. The Township requested that the crossing warning system be upgraded to automatic flashing light signals ("AFLS") and gates, citing public safety as the reason for the upgrade request. The Application indicated that: (1) the crossing is a rural crossing used by school buses; (2) accident history at the crossing includes a train-roadway grader accident in 1990; (3) train traffic at the crossing is comprised of 10 trains per day at train speeds of 49 miles per hour ("mph"); (4) vehicle speed on the rural highway at the location of the crossing is 55 mph; and (5) average daily traffic ("ADT") using the crossing approximates 100 vehicles per day. The Township concluded that the warning devices should be upgraded because visibility at the crossing is poor, placing the safety of the traveling public in jeopardy.

According to Humphries, upon the filing of such an Application, Commission Staff then weighs and evaluates the Application against all other such Applications received during the year, and assigns the Application and crossing a "Collision Prediction Value." The same process occurs each year until, eventually, an Application is selected by Staff for inclusion into the Commission's five year Grade Crossing Protection Fund Crossing Safety Program. Humphries testified that Pleasant Mound Township's Application was ultimately chosen by Staff for inclusion into the Commission's 2007-2011 five year Grade Crossing Safety Program, making the project eligible for Grade Crossing Protection Fund assistance.

Following the selection of the crossing for inclusion into the Commission's 2007-2011 safety program, Humphries next conducted a field inspection of the crossing in order to arrive at a recommendation for safety improvements at the Country Club Avenue crossing. He performed the inspection here on November 13, 2006. Humphries testified that traffic at the crossing consists of cars; trucks; school buses; agricultural machinery; hazardous materials vehicles carrying gasoline, propane, and diesel fuel; and semi-tractor trailer vehicles carrying grain. He further summarized his findings that: (1) the crossing alignment is somewhat skewed in that the train track is not located at a true 90 degree angle to the Country Club Avenue roadway, thereby making the crossing less safe than it would be if the track-roadway angle were a true 90 degree angle; (2) there are sight restrictions to stopping visibility for the motoring public in two of the four quadrants of the crossing, caused by trees and brush running along the track in one quadrant, and grain silos, a machinery shed and machinery along the roadway in another quadrant; and (3) there are potential restrictions to clearing visibility and stopping visibility in the other two quadrants, caused by seasonal crops in the fields in those other two quadrants. Humphries' inspection concluded that the AFLS and gates upgraded protection requested by the Township was necessary to the safety of the traveling public.

Given the inspection results and investigation, Humphries wrote to the Railroad requesting a plan and estimate of costs for the signalization upgrade at the crossing. BNSF provided the estimate to Humphries, which showed a cost for installation of AFLS and gates in the amount of \$151,671. Using the estimate obtained from the Railroad, Humphries prepared Stipulated Agreement #1253 and, on January 4, 2007, mailed the Stipulated Agreement to all of the Parties for execution. The Stipulated Agreement allocated responsibility for the costs of the project as follows: \$128,920 (85%) to the Grade Crossing Protection Fund; \$15,167 (10%) to Pleasant Mound Township; and \$7,584 (5%) to BNSF. The Stipulated Agreement further allocated responsibility for all future maintenance costs of the signals and warning devices to the Railroad.

According to Humphries, Staff executed the Stipulated Agreement on behalf of the Commission. Both BNSF and IDOT also subsequently executed and returned the Stipulated Agreement. However, the Pleasant Mound Township Road Commissioner, Jeffrey Tompkins, refused and failed to execute the Stipulated Agreement.

Humphries followed up the refusal of the Township to execute the agreement with a letter to Tompkins and the Township requesting execution or other action on the Stipulated Agreement. Upon receiving no response, Humphries then made telephone calls to Tompkins requesting that the agreement be executed. The only response he received to

the phone calls was that 'the signal upgrade had been made by Tompkins' predecessor Township Road Commissioner, and not by Tompkins. Humphries testified that he never received a written response from the Township to that effect; nor were his subsequent follow up phone calls and messages ever returned. Humphries' additional attempts to call the Bond County Engineering office were met with the same reaction: no response. Humphries further testified that Pleasant Mound Township at no time indicated that it did not have sufficient funds to pay its allocated share of project costs. If the Township had expressed difficulty in obtaining funds or other funding problems, the Commission would have assisted the Township with those problems. Humphries reiterated that the only excuse he was given for the Township refusing to execute the Stipulated Agreement was that the safety upgrade was made by Tompkins' predecessor Road Commissioner, and not by Tompkins.

STAFF'S POSITION ON CROSSING WARNING DEVICE UPGRADE

Commission Railroad Safety Staff was of the opinion that the project is in the interest of the safety of the traveling public, and that the passive warning signs and crossbucks located at the Country Club Avenue/BNSF rail-grade crossing near Smithboro in Bond County should be replaced by the installation of automatic flashing lights and gates controlled by constant warning time circuitry. Staff stated that the Law requires installation of temporary highway "STOP" signs at the crossing during construction while the signalization improvements are being made by the Railroad. Staff was of the further opinion that the costs of the improvement should be assessed at 85% to the Grade Crossing Protection Fund, 10% to Pleasant Mound Township, and 5% to the Railroad, with BNSF responsible for all costs of future maintenance of the crossing warning devices. Staff requested BNSF to provide an updated estimate of costs for installation of the crossing warning devices. The Railroad concurred with Staff's request, and filed a revised estimate showing project costs at \$168,142.

BNSF'S AND IDOT'S POSITIONS

BNSF concurs with Staff's position, and stands ready to abide by the terms of the original Stipulated Agreement requiring the Railroad to perform the work required thereunder, and allocating 5% of the total cost of the project to the Railroad. BNSF further agrees to the allocation to the Railroad of all future maintenance costs associated with the warning device equipment, AFLS, and gates. IDOT also concurs with Staff's position, and advises that the Department is prepared to abide by the terms of the Stipulated Agreement. IDOT requests that the Commission enter an Order approving the project and incorporating the terms of Stipulated Agreement #1253 into the Order.

PROPOSED ORDER

A Proposed Order approving the project and incorporating the terms of Stipulated Agreement #1253 into the Order was filed on _____, 2008, and was served upon Staff, Pleasant Mound Township, BNSF Railway Company and the Illinois Department of Transportation.

COMMISSION ANALYSIS AND CONCLUSION

The Commission is of the opinion that the facts adduced at hearing support an Order improving public safety at the Country Club Avenue highway-rail grade crossing of BNSF Railway Company's track near Smithboro, Bond County, Illinois designated as crossing AAR/DOT #069 151J, railroad milepost 92.22-Y, by the installation of automatic flashing lights and gates controlled by constant warning time circuitry. The Commission is of the further opinion that the costs of the improvement should be assessed at 85% to the Grade Crossing Protection Fund, 10% to Pleasant Mound Township, and 5% to the Railroad, with BNSF responsible for all costs of future maintenance of the crossing warning devices.

FINDINGS AND ORDERING PARAGRAPHS

The Commission, having given due consideration to the entire record herein and being fully advised in the premises, is of the opinion and finds that:

- (1) The Commission has jurisdiction over the parties and the subject matter of this proceeding;
- (2) The recitals of fact set forth in the prefatory portion of this Order are supported by the evidence and are adopted as findings of fact;
- (3) The evidence adduced at hearing supports a finding and Order that public safety requires that the passive warning signs and crossbucks located at the Country Club Avenue/BNSF rail-grade crossing near Smithboro in Bond County should be replaced by the installation of automatic flashing light signals and gates controlled by constant warning time circuitry;
- (4) The cost for the proposed improvements should be divided among the parties and the Grade Crossing Protection Fund of the Motor Fuel Tax Law, in accordance with the Law and the rules and regulations of the Commission;
- (5) It is fair and reasonable that the Secretary of the Illinois Department of Transportation through the Grade Crossing Protection Fund of the Motor Fuel Tax Law, the Pleasant Mound Township Road District, and BNSF Railway Company be directed to pay their respective portions of the actual cost of the proposed improvements as follows: \$142,921 (85%) to the Grade Crossing Protection Fund; \$16,814 (10%) to Pleasant Mound Township; and \$8,407 (5%) to BNSF Railway Company;
- (6) It is fair and reasonable that BNSF Railway Company also be allocated responsibility for all future maintenance and maintenance costs associated with the crossing warning devices;
- (7) Public Act 93-0604 (effective November 21, 2003), which amends 625 ILCS 18c-7401 (Safety Requirements for Track, Facilities, and Equipment), requires installation of temporary STOP signs whenever the Commission

authorizes the installation of automatic flashing light signals and gates at public highway-rail grade crossings. The temporary STOP signs shall remain in place until the luminous flashing signal or crossing gate devices have been installed and made operational. The rail carrier is responsible for the cost of the installation and subsequent maintenance of any required temporary STOP signs.

- (8) 625 ILCS 5/18c-1701 and 1704 require each "person," as defined by Section 18c-1104, to comply with every regulation or order of the Commission. These sections further provide that any person who fails to comply with a Commission regulation or order shall forfeit to the state not more than \$1,000 for each such failure, with each day's continuance of the violation being considered a separate offense. While the Commission expects all parties to comply with this Order in all matters addressed herein and in a timely manner, the Commission advises that any failure to comply may result in the assessment of such sanctions.
- (9) Any person making a Request for an Extension of Time up to 30 days to complete a project ordered by the Commission must file a request with the Director of Processing and Information no later than 14 days in advance of the scheduled deadline. An Administrative Law Judge will consider and decide the request.
- (10) Any person making a Request for an Extension of Time that exceeds 30 days must file a Petition for Supplemental Order with the Director of Processing and Information no later than 21 days in advance of the scheduled deadline. The Commission will decide Petitions for Supplemental Orders.
- (11) Requests for Extension of Time and Petitions for Supplemental Orders must include the reason(s) the additional time is needed to complete the work and the time within which the project will be completed. Prior to submitting a Request for Extension of Time or a Petition for Supplemental Order, the person must notify the Commission's Rail Safety Program Administrator that it is unable to complete the project within the ordered timeframe.
- (12) The Commission or its Administrative Law Judge reserves the right to deny Petitions for Supplemental Orders and Requests for Extension of Time, if the reason(s) supporting the request is (are) insufficient or where it appears the person has not made a good faith effort to complete the project within the allotted time. Failure of the Commission or Administrative Law Judge to act on a pleading prior to the deadline means the originally ordered completion date remains in effect.

IT IS THEREFORE ORDERED that BNSF Railway Company is hereby directed to remove the passive warning signs and crossbucks located at the Country Club Avenue/BNSF rail-grade crossing near Smithboro in Bond County, and install automatic flashing light signals and gates controlled by constant warning time circuitry.

IT IS FURTHER ORDERED that BNSF is required to install, within 30 days from the date of this Order, temporary STOP signs at the crossing and that the temporary STOP signs shall remain in place until the luminous flashing signal or crossing gate devices have been installed and placed in operation. BNSF is responsible for the cost of the installation and subsequent maintenance of any required temporary STOP signs.

IT IS FURTHER ORDERED that the Secretary of the Illinois Department of Transportation through the Grade Crossing Protection Fund of the Motor Fuel Tax Law, the Pleasant Mound Township Road District, and BNSF Railway Company be directed to pay their respective portions of the actual cost of the proposed improvements as follows: \$142,921 (85%) from the Grade Crossing Protection Fund; \$16,814 (10%) from Pleasant Mound Township; and \$8,407 (5%) from BNSF Railway Company.

IT IS FURTHER ORDERED that BNSF Railway Company be responsible for all future maintenance and maintenance costs associated with the crossing warning devices.

IT IS FURTHER ORDERED that BNSF Railway Company is and it is hereby, required and directed to proceed immediately in performing the work set forth herein and shall complete the work within twelve (12) months from the date of this Order.

IT IS FURTHER ORDERED that the BNSF Railway Company shall, within 5 days of the installation, furnish a written statement to the Director of Processing and Information, of the Commission's Transportation Bureau, indicating that the temporary STOP signs have been installed at the County Club Avenue grade crossing.

IT IS FURTHER ORDERED that all bills for the warning device installation expenditures authorized for reimbursement from the Grade Crossing Protection Fund shall be submitted to the Fiscal Control Unit, Bureau of Local Roads and Streets, Illinois Department of Transportation, 2300 South Dirksen Parkway, Springfield, Illinois 62764. The Department shall send a copy of all invoices to the Director of Processing and Information, Transportation Bureau of the Commission. All bills shall be submitted no later than twelve (12) months from the completion date specified in this Order. The final bill for expenditures from each party shall be clearly marked "Final Bill." The Commission shall, at the end of the 12th month from the completion date specified in this Order or any Supplemental Order, conduct a review to determine if any unused assistance from the Grade Crossing Protection Fund should be deobligated. Upon completion of the review, the Commission shall notify the Department to deobligate all residual funds accountable for installation costs for this project.

IT IS FURTHER ORDERED that BNSF Railway Company shall file Form 3 of 92 Illinois Administrative Code 1535 of this Commission showing details of the required automatic warning devices and shall receive approval by X-Resolution before commencing the work of installation.

IT IS FURTHER ORDERED that the BNSF Railway Company shall within five (5) days of the completion of the work herein required, submit a completely updated United States Department of Transportation Inventory Form (#6180.71) to the Federal Railroad Administration, the Chief of Data Services at the Illinois Department of Transportation, and

the Director of Processing and Information, Transportation Bureau of the Commission.

IT IS FURTHER ORDERED that the BNSF Railway Company be, and it is hereby required and directed to submit a Project Status Report, to the Director of Processing and Information, Transportation Bureau of the Commission, stating that the work herein required of it has been completed. Said Report shall be submitted within five (5) days after the project completion date.

IT IS FURTHER ORDERED THAT any person making a Request for an Extension of Time up to 30 days to complete a project ordered by the Commission must file a request with the Director of Processing and Information no later than 14 days in advance of the scheduled deadline. An Administrative Law Judge will consider and decide the request.

IT IS FURTHER ORDERED THAT any person making a Request for an Extension of Time that exceeds 30 days must file a Petition For Supplemental Order with the Director of Processing and Information no later than 21 days in advance of the scheduled deadline. The Commission will decide Petitions for Supplemental Orders.

IT IS FURTHER ORDERED THAT requests For Extension Of Time and Petitions For Supplemental Orders must include the reason(s) the additional time is needed to complete the work and the time within which the project will be completed. Prior to submitting a Request for Extension of Time or a Petition for Supplemental Order, the person must notify the Commission's Rail Safety Program Administrator that it is unable to complete the project within the ordered timeframe.

IT IS FURTHER ORDERED THAT the Commission or its Administrative Law Judge reserves the right to deny Petitions for Supplemental Orders and Requests for Extension of Time, if the reason(s) supporting the request is (are) insufficient or where it appears the person has not made a good faith effort to complete the project within the allotted time. Failure of the Commission or Administrative Law Judge to act on a pleading prior to the deadline means the originally ordered completion date remains in effect.

IT IS FURTHER ORDERED that, subject to Section 18c-2201 and 18c-2206 of the Law, this is a final decision subject to the Administrative Review Law.

By Order of the Commission this ____ day of _____, 2008.

CHARLES E. BOX
CHAIRMAN